

May 31, 2002

MEMORANDUM

SUBJECT: Bona Fide Prospective Purchasers and the New Amendments to CERCLA

FROM: Barry Breen, Director /s/
Office of Site Remediation Enforcement

TO: Superfund Senior Policy Managers (Region I - X)
Regional Counsels (Regions I - X)

I. Introduction

Since 1989, EPA has negotiated agreements that provide a covenant not to sue for certain prospective purchasers of contaminated property prior to their acquisition, in order to resolve the potential liability due to ownership of such property. These agreements are known as Prospective Purchaser Agreements ("PPAs")¹. In January 2002, CERCLA was amended through enactment of Public Law 107-118, titled the Small Business Relief and Brownfield Revitalization Act ("Brownfields Amendments"). Among other things, the Brownfields Amendments provide a limitation on liability for persons who qualify as bona fide prospective purchasers ("BFPPs"). Congress' intent in enacting this provision was to remove certain liability barriers to purchases of property and encourage redevelopment.

EPA believes that, in most cases, the Brownfields Amendments make PPAs from

¹ The PPA guidance is available at OSRE's Web page at <http://es.epa.gov/oeca/osre/ppa.html>. This guidance is titled "Guidance on Settlements with Prospective purchasers of Contaminated Property," dated May 24, 1995, which superceded earlier guidance issued June 6, 1989. The model PPA agreement was last revised on September 30, 1999. Additional guidance documents on the subject of prospective purchasers include a checklist, issued October 1, 1999, of documents likely to be requested from a prospective purchaser seeking a PPA, and a clarification, issued January 10, 2001, of PPA guidance titled "Support of Regional Efforts to Negotiate Prospective Purchaser Agreements (PPAs) at Superfund Sites and Clarification of PPA Guidance." The guidance listed is not being replaced by this memorandum, but is rather being supplemented.

the federal government unnecessary. The following discussion describes when, primarily because of significant public benefit, EPA will consider providing a prospective purchaser with a covenant not to sue now that the Brownfields Amendments are law.

II. Background

Subtitle B of the new Brownfields Amendments, through the addition of CERCLA section 107(r), provides a limitation on liability for a “bona fide prospective purchaser” whose potential liability is based solely on the purchaser’s being an owner or operator of a facility, and provided that the purchaser does not impede the performance of a CERCLA action. New subsection 101(40) defines “bona fide prospective purchaser” as a person, or tenant of that person, who acquires ownership of a facility after the date of enactment of the Brownfields Amendments, January 11, 2002, and by a preponderance of the evidence establishes the following:

1. disposal at the facility occurred prior to acquisition;
2. the person made all appropriate inquiry into previous ownership and uses of the facility in accordance with generally accepted practices and in accordance with the new standards contained in section 101(35)(B);
3. the person provides all legally required notices with respect to hazardous substances found at the facility²;
4. the person exercises “appropriate care” with respect to the hazardous substances found at the facility by taking “reasonable steps” to:
 - a. stop any continuing releases;
 - b. prevent any threatened future release;
 - c. prevent or limit human, environmental or natural resource exposure to any previously released hazardous substance;
5. the person provides full cooperation and access to the facility to those authorized to conduct response;
6. the person is in compliance with any land use restrictions and does not impede the effectiveness or integrity of any institutional control;
7. the person complies with any information request or administrative subpoena under CERCLA; and
8. the person is not potentially liable for response costs at the facility or “affiliated” with any such person through
 - a. direct or indirect familial relationship or
 - b. any contractual, corporate or financial relationship (excluding relationships created by instruments conveying or financing title or by

² This requirement is very site specific, and will depend on gaining an understanding of which hazardous substances if any are on the property, through making “all appropriate inquiry” into previous uses of the property. Once the nature of any contamination is more fully understood, then any required notices will be more evident.

contracts for sale of goods or services).

The BFPP provisions represent a significant change in CERCLA. For the first time, a party may purchase property with knowledge of contamination and not acquire liability under CERCLA as long as that party meets the BFPP criteria³. The new Amendments should provide significant savings of time and transaction costs. Private parties will now be able to avoid the costs associated with negotiating PPAs, and the timing of the transaction will be within the control of the parties to the transaction and need not await federal government approval of the terms of a PPA.

A BFPP may be subject to a "windfall lien" under the newly added CERCLA Section 107(r), up to the amount of unrecovered response costs incurred by the United States at a facility for which the owner is not liable as a BFPP, and where the response action increases the fair market value of the facility. As to the amount and duration of any windfall lien, the Brownfields Amendments state that the amount is not to exceed the increase in fair market value attributable to the response action at the time of sale or other disposition of the property.⁴ The windfall lien arises at the time response costs at the facility are incurred by the United States, and shall continue until the earlier of satisfaction of the lien by sale or other means, or, notwithstanding any statute of limitations under CERCLA Section 113, recovery of all response costs incurred at the facility.

III. Discussion

EPA's long-standing policy is not to become involved in purely private real estate transactions. The Brownfields Amendments reinforce the appropriateness of that policy. The Amendments provide a limitation on liability from CERCLA to persons who qualify as BFPPs thereby making a federal covenant not to sue under CERCLA unnecessary. In light of the new Amendments, effective as of the date of enactment, purchasers should no longer need PPAs with the federal government in order to complete the vast majority of real estate transactions involving contaminated property.

While EPA believes the necessity for PPAs has been largely addressed by congressional action, the Agency recognizes that in limited instances the public interest will be served by

³ CERCLA section 107(q) creates another category of person, a contiguous property owner, who will not be considered to be an owner or operator of a facility so long as that person makes all appropriate inquiry into previous uses of the property and does not discover that it is contaminated. If such person has knowledge of contamination at the time of acquisition, he may qualify as a bona fide prospective purchaser under CERCLA section 101(40), so long as he meets the other requirements of that section.

⁴ Therefore, where the lien arises, the lien shall not exceed the increase in fair market value attributable to the response action.

entering into PPAs or some other form of agreement⁵. First, where there is likely to be a significant windfall lien and the purchaser needs to resolve the lien prior to purchasing the property (e.g. to secure financing), EPA may consider entering into an agreement with the purchaser.⁶

Second, there may be projects in which a PPA is necessary to ensure that the transaction will be completed and the project will provide substantial public benefits to, for example, the environment, a local community because of jobs created or revitalization of long blighted, under-utilized property, or promotion of environmental justice. In these limited circumstances, the following examples may provide some general guidelines on when such an agreement may be considered:

1. Significant environmental benefits will be derived from the project in terms of cleanup, reimbursement of EPA response costs, or new use, and there is a significant need for a PPA in order to accomplish the project's goals.

Example: The purchasers are committing to perform significant cleanup as they develop the site for a new use and have concerns about facility "owner or operator" liability.

Example: There has been no facility cleanup, no viable potentially responsible party exists who can be required to timely conduct the cleanup (the current owner may be in bankruptcy), and no potential developer is willing to undertake the entire cleanup in order to develop and use the facility, which, without a PPA, may sit idle for years.

2. The facility is currently involved in CERCLA litigation such that there is a very real possibility that a party who buys the facility would be sued by a third party.

Example: The United States has an enforcement case under CERCLA Sections 106 and 107 pending against potentially responsible parties, and the primary defendants have

⁵ EPA also recognizes that entering into an "agreement" is not necessary in every instance where a party acquiring contaminated property has concerns about managing liability risks. EPA issued its "Policy on the Issuance of EPA Comfort/Status Letters" on November 12, 1996, in an effort to help the public better understand the environmental status of certain properties and the likelihood that EPA would become involved there.

⁶ In some cases, where a BFPP and the United States agree to resolve the United States' windfall lien claim in advance of the BFPP's purchase of the real property, such an agreement may be limited to a settlement of the Section 107(r)(2) lien claim. As stated above, Congress intended the new Section 107(r) to obviate the need for most PPAs and, therefore, settlement of the windfall lien claim may be limited to that one issue. It is EPA's present intent to discuss the windfall lien issue more fully in subsequent guidance.

sued an additional number of third party defendants, and/or there is a private party contribution action ongoing, and a prospective purchaser has been threatened with contribution litigation.⁷

3. EPA will consider entering into a PPA or other settlement in unique, site-specific circumstances not otherwise addressed above when a significant public interest would be served by the transaction and it would not otherwise occur without issuance of a PPA.

IV. Conclusion

Subtitle B—Brownfields Liability Clarifications, of the Brownfields Amendments set out the limitations on liability that are now a part of CERCLA. It is the Agency's hope and expectation that most real estate transactions concerning acquisition of brownfields properties will now move forward with no need for EPA involvement. In those unusual circumstances discussed above, EPA remains committed to removing liability barriers to redevelopment of property where it may appropriately do so.

Case specific inquiries as well as general questions regarding this policy should be directed to Helen Keplinger in OSRE's Regional Support Division at (202) 564-4221.

This memorandum is intended solely for the guidance of employees of EPA and the Department of Justice and it creates no substantive rights for any persons. It is not a regulation and does not impose legal obligations. EPA will apply the guidance only to the extent appropriate based on the facts.

cc: Susan Bromm (OSRE)
Paul Connor (OSRE)
Mike Cook (OSWER)
Benjamin Fisherow (DOJ)
Henry Friedman (DOJ)
Linda Garczynski (OSWER)
Bruce Gelber (DOJ)
Bruce Kulpan (OSRE)
Steve Luftig (OSWER)
Earl Salo (OGC)
Alan Tenenbaum (DOJ)
Jack Winder (OSRE)
EPA Brownfields Liability Exemption Subgroup

⁷ A party may have acquired property and otherwise qualify as a BFPP before being threatened with contribution action, but there is no prohibition against EPA entering into a settlement with that party after his acquisition of the property.